Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)-157 OF 2009
LOW HOP BING, ABDUL MALIK ISHAK AND T SELVENTHIRANATHAN JJCA
30 SEPTEMBER 2009

Arbitration — Stay of proceedings — Application — High Court dismissed application for stay — Appeal against decision — Whether trial judge erred in deciding not to stay proceedings and refer parties to arbitration — Arbitration Act 2005 ss 9 & 10

Words and Phrases — 'shall' — Arbitration Act 2005 s 10 — Meaning of — Whether shall means 'directory' or 'mandatory'

Redez Properties Sdn Bhd ('the employer') appointed the defendant as its main contractor. The defendant had in turn by way of two letters of award dated 4 June 2004 ('the June contract') and 19 August 2004 ('the August contract') appointed the plaintiff as its subcontractor. The plaintiff commenced an action against the defendant based on the two subcontracts and prayed for a total sum of RM445,843.29, of which a sum of RM334,273,37 was for the June contract while the balance of RM111,569.92 was for the August contract. Upon receiving the plaintiff's writ and statement of claim and before filing its defence, the defendant applied for a stay of the plaintiff's claim for the June contract on the grounds that this contract was subject to arbitration. In seeking a stay of the June contract so as to refer the disputes thereunder to arbitration, the defendant invoked s 10 of the Arbitration Act 2005 ('the Act') and/or the inherent jurisdiction of the court. The defendant submitted that when the parties executed the June contract they had expressly agreed to be bound by a series of documents, which included the PAM agreements and that the PAM agreement had an arbitration clause. The defendant relied on s 9 of the Act to support its contention that the true construction of cl 1 of the June contract ('cl 1') and cl 9 of the contract between the defendant and the employer ('cl 9') would lead to the conclusion that the June contract was subject to an arbitration agreement. The plaintiff disputed the existence of an arbitration agreement. The defendant's application for an order that the plaintiff's claim under the June contract be stayed and referred to arbitration was dismissed. The defendant lodged this appeal against that decision. The sole issue for determination was whether the trial judge had erred when he

A decided not to stay the proceedings, in respect of the June contract, and refer the parties to arbitration.

Held, allowing the defendant's appeal with costs:

B (1) (per **Low Hop Bing JCA**) Clause 1 and cl 9 must be construed liberally in line with the grammatical and ordinary meaning or the plain purpose of the words used by the parties, with necessary modification in order to avoid absurdity, inconsistency or repugnancy. It is trite law that a contract came into being from the exchange of correspondence ie by C way of letters. As such, the letter of award containing the June contract was obviously a contract which was brought into being via the correspondence. When all the aforesaid documents in writing were construed conjunctively, it was abundantly clear that the terms of the PAM Contract had been incorporated as part and parcel of the June D contract. Thus cl 34 of the PAM contract, which expressly provided for an arbitration clause, was to be applied mutatis mutandis to the June contract. Further, cl 34 of the PAM contract, which set out the arbitration clause, clearly came within the meaning of arbitration agreement in s 9 of the Act (see paras 18–28).

E (2) (per **Low Hop Bing JCA**) In the instant appeal, the proper course for the plaintiff to take was to refer the differences that had arisen between the parties to arbitration in accordance therewith, as the plaintiff had the legal obligation to abide by the terms of the June contract. The parties, who had made a contract to arbitrate their disputes, should be F held to their bargain. As the June contract had been shown to be subject to an arbitration agreement and the exceptions under s 10(1) are inapplicable the word 'shall' contained in s 10(1) made it mandatory for the court proceedings to be stayed (see paras 33–36).

G (3) (per **Abdul Malik Ishak JCA**) The keystone to arbitration was the presence of an arbitration clause or an arbitration agreement, and such an agreement existed in the instant case. Section 10 of the Act provides that a stay of the proceedings shall be imposed and the parties are required to refer the matter to arbitration when the defendant had not H taken 'any other steps in the proceedings'. In the instant appeal, the defendant by not filing its defence to the June contract had not taken any other steps in the proceedings before applying for the stay. In such circumstances, s 10 of the Act imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration. The word 'shall' that I appears in s 10 of the Act must necessarily mean 'directory' or 'mandatory' and as such the June contract must be referred to arbitration (see paras 43–45, 52–54).

(4) (per **Abdul Malik Ishak JCA**) There was no reason for the trial judge not to invoke the inherent jurisdiction of the court under O 92 r 4 of the Rules of the High Court 1980 to assist the defendant in the instant case (see paras 46–50).

[Bahasa Malaysia summary

Redez Properties Sdn Bhd ('majikan') melantik defendan sebagai kontraktor utamanya. Manakala defendan, menerusi dua pucuk surat award bertarikh 4 Jun 2004 ('kontrak Jun') dan 19 Ogos 2004 ('kontrak Ogos') melantik plaintif sebagai subkontraktornya. Plaintif memulakan tindakan terhadap defendan berdasarkan kedua-dua subkontrak tersebut dan memohon sejumlah RM445,843.29, yang mana sebanyak RM334,273,37 adalah bagi kontrak Jun manakala bakinya RM111,569.92 adalah untuk kontrak Ogos. Apabila menerima writ dan penyata tuntutan plaintif dan sebelum memfailkan pembelaannya, defendan memohon untuk penangguhan tuntutan plaintif bagi kontrak Jun atas alasan-alasan bahawa kontrak tersebut tertakluk kepada timbang tara. Dalam memohon penangguhan kontrak Jun tersebut bagi tujuan merujuk pertelingkahan tersebut kepada timbang tara, defendan menggunapakai s 10 Akta Timbang Tara 2005 ('Akta') dan/atau bidang kuasa sedia ada mahkamah. Defendan berhujah bahawa apabila pihak-pihak melaksanakan kontrak Jun tersebut, mereka nyata telah bersetuju untuk terikat kepada beberapa dokumen, yang mana termasuk perjanjian-perjanjian PAM dan bahawa perjanjian PAM tersebut mempunyai klausa timbangtara. Defendan bergantung kepada s 9 Akta untuk menyokong hujahnya bahawa tafsiran sebenar klausa 1 kontrak Jun ('klausa 1') dan klausa 9 kontrak antara defendan dan majikan ('klausa 9') akan memberi kesimpulan bahawa kontrak Jun tertakluk kepada perjanjian timbang tara. Plaintif mempertikaikan kewujudan perjanjian timbang tara tersebut. Permohonan defendan untuk suatu perintah bahawa tuntutan plaintif di bawah kontrak Jun ditangguhkan dan dirujuk kepada timbang tara telah ditolak. Defendan merayu terhadap keputusan itu. Satu-satunya isu untuk dipertimbangkan ialah sama ada hakim bicara khilaf apabila memutuskan tidak menangguhkan prosiding berkaitan kontrak Jun tersebut dan tidak merujuk pihak-pihak kepada timbang tara.

Diputuskan, membenarkan rayuan defendan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Klausa 1 dan 9 mestilah ditafsirkan secara liberal sejajar dengan maksud biasa dan tatabahasa atau tujuan jelas ayat-ayat yang digunakan oleh pihak-pihak, dengan modifikasi yang tertentu bagi mengelakkan perkara yang tidak munasabah, tidak konsisten atau percanggahan. Telah menjadi undang-undang tetap bahawa suatu kontrak wujud menerusi surat-menyurat yang berbalas-balas. Oleh itu, surat award yang mengandungi kontrak Jun adalah jelas merupakan suatu kontrak yang wujud daripada

surat-menyurat yang berbalas-balas. Apabila kesemua dokumen-dokumen bertulis tersebut ditafsirkan secara berhubung-kait, adalah jelas bahawa terma-terma kontrak PAM tersebut telah dimasukkan sebagai sebahagian kontrak Jun tersebut. Oleh itu, klausa 34 kontrak PAM, yang mana jelas memperuntukkan klausa timbang tara, harus terpakai mutatis mutandis ke atas kontrak Jun tersebut. Selanjutnya, klausa 34 kontrak PAM yang menjelaskan klausa timbang tara tersebut, ketara sekali terangkum dalam maksud perjanjian timbang tara di bawah s 9 Akta (lihat perenggan 18–28).

(2) (oleh **Low Hop Bing HMR**) Dalam rayuan ini, proses yang sesuai yang harus diambil oleh plaintif ialah merujuk pertelingkahan antara pihak-pihak kepada timbang tara seperti yang telah ditetapkan, kerana plaintif mempunyai tanggungjawab perundangan untuk mematuhi terma-terma kontrak Jun tersebut. Pihak-pihak yang telah menandatangani kontrak untuk menimbangtara pertelingkahan mereka, haruslah menepati janji itu. Disebabkan kontrak Jun telah dibuktikan tertakluk kepada perjanjian timbang tara dan pengecualian-pengecualian di bawah s 10(1) Akta tidak terpakai, ayat 'hendaklah' dalam s 10(1) menjadikannya mandatori bagi mahkamah menggantung prosiding tersebut (lihat perenggan 33–36).

(3) (oleh **Abdul Malik Ishak HMR**) Teras untuk timbang tara ialah kewujudan klausa timbang tara atau perjanjian timbang tara, dan perjanjian tersebut ada dalam kes ini. Seksyen 10 Akta memperuntukkan bahawa suatu penangguhan prosiding hendaklah dilakukan dan pihak-pihak dikehendaki merujuk perkara tersebut kepada timbang tara apabila defendan tidak mengambil 'any other steps in the proceedings'. Dalam rayuan ini, dengan tidak memfailkan pembelaannya terhadap kontrak Jun tersebut, defendan tidak mengambil apa-apa tindakan lain dalam prosiding tersebut sebelum memohon untuk penangguhan itu. Dalam keadaan sebegitu, s 10 Akta menjadikannya suatu kewajipan mandatori untuk menangguhkan prosiding tersebut dan merujuk pihak-pihak kepada timbang tara. Perkataan 'hendaklah' di dalam s 10 Akta haruslah bermaksud 'arahan' atau 'mandatori' dan oleh itu, kontrak Jun tersebut mestilah dirujuk kepada timbang tara (lihat perenggan 43–45, 52–54).

(4) (oleh **Abdul Malik Ishak HMR**) Tiada sebab bagi hakim bicara untuk tidak menggunapakai bidang kuasa sedia ada mahkamah di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membantu defendan dalam kes ini (lihat perenggan 46–50).]

Notes

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1488–1527.

Cases referred to

Baker v Yorkshire Fire and Life Assurance Company [1892] 1 QB 144, QBD (refd)

Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors [2008] 6 MLJ 817; [2008] 5 CLJ 435, CA (refd)

Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd [1988] 1 MLJ 500, HC (refd)

CHS, Re [1997] 3 MLJ 152, HC (refd)

Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors [2009] 6 MLJ 729; [2009] 9 CLJ 32, HC (refd)

CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561; [2008] 1 LNS 543, HC (refd)

Connelly v Director of Public Prosecutions [1964] AC 1254, HL (refd)

Corporacion Transnacional de Inversiones SA de CV v Stet International SpA (1999) 45 OR (3d) 183; affd (2000) 49 OR (3d) 414, CA (refd)

Innotec Asia Pacific Sdn Bhd v Inotec GMBH [2007] 8 CLJ 304, HC (refd)

Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164, SC (refd)

Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459, HC (refd)

Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29, FC (refd)

Liverpool Borough Bank, The v Turner (1860) 45 ER 715 (refd)

Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee) [1990] 1 MLJ 445, HC (refd)

Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor [2007] 10 CLJ 318, HC (refd)

Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors [2008] 2 MLJ 256, CA (refd)

Misery Babulal Tulsidas v Sayla Gram Panchayat, District Surendranagar AIR 1971 Guj 96; AIR 1971 Guj 101 (refd)

Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577, FC (refd)

Morgan v (W) Harrison Ltd [1907] 2 Ch 137, CA (refd)

Ng Khong Lim v Nancy Teo [1985] 2 MLJ 417, CA (refd)

Oonc Lines Limited v Sino-American Trade Advancement Co Ltd [1994] HKCU 35, SC (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143, HC (refd)

Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd [2003] 1 MLJ 130, CA (refd)

Schuler (L) AG v Wickman Machine Tools Sales Ltd [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683, HL (refd)

Sebor (Sarawak) Marketing & Services Sdn Bhd v SA Shee (Sarawak) Sdn Bhd [2000] 6 MLJ 1, HC (refd)

A *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97, SC (refd)
Smith v Cammell, Laird and Company, Limited [1940] AC 242, HL (refd)
Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor [2008] 1 MLJ 233; [2008] 1 CLJ 496, HC (refd)
B *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] 2 WLR 8, HC (refd)
Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872, HC (refd)
Terrapin International Ltd v Inland Revenue Commissioner [1976] 2 All ER 461, Ch D (refd)
C *Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82, HC (refd)
Woodward v Sarsons and Sadler (1874–75) LR 10 CP 733 (refd)
Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd [1996] 2 MLJ 334, HC (refd)

D **Legislation referred to**
Arbitration Act 2005 ss 1(2), 9, 9(1), (2), (3), (4), (4)(a), (b), (5), 10, 10(1), (1)(a), (b)
Rules of the High Court 1980 O 92 r 4

Appeal from: Suit No MT1–22–801 of 2006 (High Court, Johor Bahru)

E *Justin Voon (Alvin Lai with him) (Sidek Teoh Wong & Dennis) for the appellant. HK Yoong (HK Yoong) for the respondent.*

Low Hop Bing JCA:

F APPEAL

[1] This appeal was lodged against the decision of the Johor Bahru High Court in dismissing the appellant's ('the defendant's') summons in chambers which sought, inter alia, an order that the respondent's ('the plaintiff's') claim
G for RM334,273.37 be stayed and referred to arbitration.

[2] On 6 July 2009, we allowed the defendant's appeal. Our grounds are set out below.

H FACTUAL BACKGROUND

[3] The factual background is simple and straightforward.

I **[4]** The plaintiff's claim consists of two separate causes of action, based on two different subcontracts awarded by the defendant, viz:

(a) letter of award dated 4 June 2004 ('the June contract') for the construction of two show units of double-story semi-detached houses and one unit of sales pavilion; and

(b) letter of award dated 19 August 2004 ('the August contract') for external sewerage works.

[5] The defendant is the main contractor of Redez Properties Sdn Bhd ('the employer'). The defendant had in turn appointed the plaintiff as its subcontractor.

[6] Pursuant to the two subcontracts, the plaintiff prays for the total sum of RM445,843.29, of which a sum of RM334,273.37 is for the June contract; while the balance of RM111,569.92 is for the August contract.

[7] Upon receiving the plaintiff's writ and statement of claim, and before filing the defence on 11 December 2006, the defendant took immediate steps on 8 December 2006 to apply for a stay, pending arbitration, of the claim for RM334,273.37 under the June contract only.

[8] The defence, filed by the defendant on 11 December 2006, is in relation to the plaintiff's claim based on the August contract which is not subject to an arbitration agreement.

[9] It is to be noted that only the June contract is the subject matter of the High Court summons in chambers and now in the instant appeal.

ARBITRATION AGREEMENT

[10] The defendant's learned counsel Mr Justin Voon (assisted by Mr Alvin Lai) raised the issue that in cl 1 of the June contract ('cl 1') and cl 9 of the contract between the defendant and Redez Properties Sdn Bhd ('cl 9'), the word 'executed' means 'signed'. They relied on s 9 of the Arbitration Act 2005 in support of their contention that the true construction of cl 1 and cl 9 would lead to the conclusion that the June contract is subject to an arbitration agreement (a reference hereinafter to a section is a reference to that section in the Arbitration Act 2005).

[11] Mr HK Yoong, the plaintiff's learned counsel, took the position that the word 'executed' in cl 1 and cl 9 means 'implemented, performed or carried out' and not 'signed'. He disputed the existence of an arbitration agreement.

[12] In the court of first instance, the learned judicial commissioner held that the June contract was not subject to an arbitration agreement and so declined to refer the dispute to arbitration.

[13] We have identified the question for determination in the instant appeal as follows:

> Upon the true construction of cl 1 and cl 9, and having regard to s 9, is the June contract subject to an arbitration agreement?

[14] The answer to the above question makes it necessary to reproduce the relevant portions of cl 1 and cl 9 as follows:

> Cl 1: This contract *executed* based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called 'The Main Contractor') and Redez Properties Sdn Bhd (hereinafter called 'The Employer') and all correspondence including the Letter of Award between the Main Contractor and The Employer. (Emphasis added.)
>
> Cl 9: The contract *executed* will be based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called 'the Main Contractor') and Redez Properties Sdn Bhd (hereinafter called 'The Employer'). The contract shall be based on the Agreement and Conditions of Building Contract (Without Quantities) published (sic 'by') Pertubuhan Akitek Malaysia ('PAM Contract'), together with amendments, additions or modifications as mentioned above. (Emphasis added.)

[15] First of all, it is appropriate for us to deal with the meaning of the word 'executed'. A plain reading thereof reveals that the word is used respectively in relation to the two contracts expressly contained therein. We are of the view that in that context, the word 'executed' means 'made or brought into existence' eg a contract by going through the formalities necessary to the validity thereof: see *Misery Babulal Tulsidas v Sayla Gram Panchayat, District Surendranagar* AIR 1971 Guj 96; AIR 1971 Guj 101. By way of illustration, the execution of a deed is a process which consists of signature, sealing and delivery unconditionally: per Walton J in *Terrapin International Ltd v Inland Revenue Commissioner* [1976] 2 All ER 461 at p 466.

[16] In the instant appeal, the June contract was awarded by the defendant to the plaintiff. It was signed by the defendant's director, and supported by all the terms and conditions stipulated therein, which had been acknowledged and accepted by the plaintiff's director and manager; both of them have also signed the 'Acknowledgment and Acceptance' form. In our view, there is no doubt that the June contract has been 'executed' ie signed, sealed and delivered or brought into existence by the parties concerned

[17] The plaintiff and the defendant, having 'executed' the June contract, had in effect adopted and incorporated all the other relevant documents specifically stipulated therein, including the PAM contract. In other words,

by the June contract, they had expressly agreed to be bound by a series of documents, viz:

(a) Under cl 1, the letter of award dated 4 June 2004 which is based on:

(i) the terms and conditions as stipulated in the contract document between the main contractor, Albilt Resources Sdn Bhd (ie the defendant) and Redez Properties (ie the employer); and

(ii) all correspondence including the letter of award between the defendant and the employer.

(b) Under cl 9, the terms and conditions as stipulated in the contract document between the defendant and the employer; and that in turn shall be based on the PAM contract, together with amendments, additions or modifications.

[18] Clause 1 and cl 9 must be construed liberally in line with the grammatical and ordinary meaning or the plain purpose of the words used by the parties, with necessary modification in order to avoid absurdity, inconsistency or repugnancy: see eg *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256 at p 269 (CA), per Suriyadi Halim Omar JCA; *The Interpretation of Contracts* by Kim Lewinson, Sweet & Maxwell 1989; *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 at p 589 (FC); *Schuler (L) AG v Wickman Machine Tools Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683 (HL); *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd* [1988] 1 MLJ 500 at p 504 (HC); *Ng Khong Lim v Nancy Teo* [1985] 2 MLJ 417 at p 420 (CA) Singapore; and *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 at p 165 (SC) per Hashim Yeop A Sani CJ (Malaya) (as he then was).

[19] We also opine that the word 'correspondence' in cl 1 should be construed to include all correspondence including the letter of award between the main contractor and the employer. It is trite law that a contract can come into being from the exchange of correspondence ie by way of letters. The letter of award containing the June contract is obviously a contract which was brought into being via correspondence.

[20] When all the aforesaid documents are construed conjunctively, it is abundantly clear that the terms of the PAM contract have been incorporated as part and parcel of the June contract.

[21] It has not been disputed that cl 34 of the PAM contract expressly provides for an arbitration clause which is to be applied mutatis mutandis to the June contract.

[22] The true construction of the PAM contract brings into focus s 9 which merits reproduction in extenso as follows:

> (1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) *An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.*
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing where it is contained in —
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
>
> (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) *A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.* (Emphasis added.)

[23] Under s 9(1), 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Cl 34 of the PAM contract, which sets out the arbitration clause, clearly comes within the meaning of 'arbitration agreement' in s 9(1).

[24] Section 9(2) allows an arbitration agreement to be 'in the form of an arbitration clause in an agreement or in the form of a separate agreement,' such as the PAM contract herein.

[25] Section 9(3) requires an arbitration agreement to be in writing.

[26] Under s 9(4), an arbitration agreement in writing may be contained in the documents enumerated therein, viz:

> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of the statement of claim and of the defence in which the existence of an agreement is alleged by one party and not denied by the other.

[27] The June contract and the documents expressly incorporated therein have clearly satisfied the requirement of being in writing under s 9(3) and are contained in the documents as specified in s 9(4)(a) and (b).

[28] Section 9(5) provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement. This again has been fulfilled in cl 34 of the PAM contract, which has been referred to and adopted in the employer's letter which has been similarly adopted in the June contract.

[29] In Hong Kong, the existence of a written arbitration agreement can be evidenced by written communications exchanged between the parties, even though one party has never signed the agreement containing the arbitration clause: *Oonc Lines Limited v Sino-American Trade Advancement Co Ltd* [1994] HKCU 35 (SC HK): and see also *The Annotated Statutes of Malaysia* (2006 Issue) at p 103 published by LexisNexis.

[30] In England, it is not necessary that in all cases the written agreement to refer the matter to arbitration must be signed by both parties: see *Baker v Yorkshire Fire and Life Assurance Company* [1892] 1 QB 144 at p 147 per Al Smith J (the assured affirmed his contract by suing on the policy, and was bound by an arbitration clause although he had not signed the policy) ibid at p 104. And an arbitration agreement may be deduced from correspondence between the parties: *Morgan v (W) Harrison Ltd* [1907] 2 Ch 137 (CA), at p 104.

[31] In Canada, parties may enter into a valid arbitration agreement by entering into a contract that incorporates by reference another document that provides for arbitration: *Corporacion Transnacional de Inversiones SA de CV v Stet International SpA* (1999) 45 OR (3d) 183; affd (2000) 49 OR (3d) 414 (CA) (Ont, Can), at p 105.

[32] Within our shores, a written agreement for arbitration can be deduced from the minutes recording the agreement and the written acceptance by the arbitrator of his appointment: *Sebor (Sarawak) Marketing & Services Sdn Bhd v SA Shee (Sarawak) Sdn Bhd* [2000] 6 MLJ 1 at p 7, Ian Chin J (as he then was), at p 104.

[33] Reverting to the mainstream of the instant appeal, where disputes or differences have arisen between the parties pursuant to the June contract, as is evident in paras 15–20 of the first affidavit of Wong Chi Weng affirmed on 7 December 2006 for the defendant, the proper course for the plaintiff to take is to refer these disputes to arbitration in accordance therewith, as the plaintiff has the legal obligation to abide by the terms of the June contract. The parties, who made a contract to arbitrate their disputes, should be held to their bargain. This proposition is supported by high authority: eg *Pekeliling Triangle Sdn Bhd & Anor v Chase Perdana Bhd* [2003] 1 MLJ 130 at pp 146 and 148 (CA); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 and the authorities cited therein.

[34] It is the prima facie duty of the court to act upon such an arbitration agreement: *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 as applied in *Pekeliling Triangle Sdn Bhd*.

[35] The defendant's position, in seeking to stay the proceedings in the High Court and to refer the disputes or differences to arbitration, is further strengthened by s 10 which reads as follows:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds —
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[36] As the June contract has been shown to be subject to an arbitration agreement and the exceptions under s 10(1) are inapplicable, the peremptory language especially the word 'shall' contained in s 10(1) makes it mandatory for the court proceedings to be stayed. Authorities supporting this proposition include:

(a) *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817; [2008] 5 CLJ 435 (CA);

(b) *Innotec Asia Pacific Sdn Bhd v Inotec GMBH* [2007] 8 CLJ 304 (HC);

(c) *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; [2008] 1 CLJ 496 (HC);

(d) *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;

(e) *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561; [2008] 1 LNS 543 (HC); and

(f) *Chut Nyak Isham bin Nyak Ariff v Malaysian Technology Development Corp Sdn Bhd & Ors* [2009] 6 MLJ 729; [2009] 9 CLJ 32 (HC).

CONCLUSION

[37] It is abundantly clear to us that the answer to the above question is in the affirmative. The plaintiff's claim based on the June contract should have been stayed pending arbitration. The learned judicial commissioner has therefore erred in dismissing the defendant's application which sought the stay and reference to arbitration. Hence, we allowed the defendant's appeal, set aside the order of the court below and substituted it with an order that the plaintiff's claim for the sum of RM334,273.37 be stayed and referred to arbitration. Costs of RM7,000 to the defendant here and in the court below. Deposit to the defendant on account of the fixed costs.

[38] My learned brothers Abdul Malik Ishak and T Selventhiranathan JJCA have also prepared their judgments respectively in support of mine, and arrived at the same conclusion.

Abdul Malik Ishak JCA:

[39] The well written judgment of my learned brother Low Hop Bing JCA in setting out the facts and the law has greatly assisted me in writing this supporting judgment. The parties shall be referred to in the same manner as His Lordship Low Hop Bing JCA has done and this supporting judgment centres on the June contract and not the August contract.

[40] By way of a summons in chambers, the defendant (Albilt Resources Sdn Bhd) sought an order that the plaintiff's claim (Casaria Construction Sdn Bhd) for the June contract amounting to RM334,273.37 be stayed and referred to arbitration. It is the stand of the defendant that the June contract is subject to arbitration, where any dispute or difference shall be referred to arbitration.

[41] The terms of the PAM agreement have been incorporated into the terms of the June contract. It is not disputed that all PAM agreements have an arbitration clause.

[42] Upon receipt of the writ and the statement of claim, the defendant took immediate steps to apply for a stay by way of a summons in chambers in relation to the June contract. This was on 8 December 2006. And the defendant filed its defence on 11 December 2006 in relation to the August contract which is not subject to an arbitration agreement.

[43] In seeking a stay of the June contract and thereafter to refer the disputes or differences thereunder to arbitration, the defendant invoked s 10 of the Arbitration Act 2005 (Act 646) and/or the inherent jurisdiction of the court. It is rather unfortunate that the learned judicial commissioner did not give effect to s 10 of the same Act nor did he invoke the inherent jurisdiction of the court when deliberating upon the defendant's summons in chambers' application. My learned brother Low Hop Bing JCA has reproduced verbatim s 10 of the same Act and I do not propose to reproduce that section in this judgment. Suffice for me to say that s 10 of the same Act imposes a mandatory obligation to stay the proceedings and refer the parties to arbitration. The word 'shall' that appears in s 10 of the same Act must necessarily mean 'directory' or 'mandatory' (*Stylo Shoes Ltd v Prices Tailors Ltd* [1960] 2 WLR 8). In *Smith v Cammell, Laird and Company, Limited* [1940] AC 242 (HL) at p 258, Lord Atkin spoke of the compulsory terms of a statute in this way:

> It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another.

[44] Coleridge CJ in *Woodward v Sarsons and Sadler* (1874–75) LR 10 CP 733 at pp 746–747, aptly said that:

> ... an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

[45] In order to determine the real intention of the legislature in enacting s 10 of the Arbitration Act 2005 (Act 646), one must read and understand that section in its appropriate context. A stay of the proceedings shall be imposed and the parties are required to refer the matter to arbitration when the defendant has not taken 'any other steps in the proceedings.' In regard to the June contract, the defendant has not taken any other steps in the proceedings before applying for the stay. The defendant, for instance, did not

file its defence in regard to the June contract. Indeed this approach was recommended by Lord Campbell LC in *The Liverpool Borough Bank v Turner* (1860) 45 ER 715 at p 718, when His Lordship said:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

[46] Invoking the inherent jurisdiction of the court is the best way to prevent injustice or to prevent an abuse of the process of the court. Order 92 r 4 of the Rules of the High Court 1980 ('RHC') reads as follows:

> 4 Inherent powers of the Court (O 92 r 4)
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[47] The scope of r 4 of O 92 of the RHC is very wide and no precise definition can be formulated. It is part procedure and part substantive. It is exercisable by way of a summary process. It can be invoked in many ways and in relation to anyone, whether a party or not. Lord Morris of Borth-Y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at p 1301 aptly said that:

> A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[48] There is no reason for the learned judicial commissioner not to invoke the inherent jurisdiction of the court to assist the defendant. Way back in 1984, Edgar Joseph Jr J (as he then was) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 147 succinctly said that: 'It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a court of law'; 'to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner'.'

[49] The courts in *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445, in *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334, and in *Re CHS* [1997] 3 MLJ 152 vigorously invoked their inherent jurisdiction in order to avoid an injustice.

[50] The inherent jurisdiction of the court is part and parcel of the machinery of justice. It may be exercised in any given situation notwithstanding that there is r 4 of O 92 of the RHC governing the circumstances of the case. The powers conferred by r 4 of O 92 of the RHC are additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court.

[51] The Arbitration Act 2005 (Act 646) was enacted on 30 December 2005 and it brought about wholesale reform of the arbitral regime. It was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Arbitration Act 2005 (Act 646) repealed and replaced the Arbitration Act 1952 (Act 93) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) which enacts the New York Convention dealing with the recognition and enforcement of international awards.

[52] Now s 10 of the Arbitration Act 2005 (Act 646) provides for a mandatory stay of court proceedings where there is an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is in fact no dispute between the parties with regard to the matters to be referred.

[53] The courts have allowed a mandatory stay for arbitrations held in Malaysia and this can be seen in the following cases:

(a) *Standard Chartered Bank Malaysia Bhd v City Properties Sdn Bhd & Anor* [2008] 1 MLJ 233; [2008] 1 CLJ 496;

(b) *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor* [2008] 3 MLJ 872;

(c) *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561; [2008] 1 CLJ 496;

(d) *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ 817; [2008] 5 CLJ 43 (CA); and

(e) *Majlis Ugama Islam dan Adat Resam Melayu Pahang v Far East Holdings Bhd & Anor* [2007] 10 CLJ 318.

[54] I am constrained to allow the stay of the June contract for arbitration to be conducted on the matter. The main objective of having an arbitration clause in a contract is to ensure that when a controversy arises between the parties, neither one of them is able to avoid arbitration. It goes without saying

that there can be no arbitration without an effective and valid arbitration clause. The keystone to arbitration is the presence of an arbitration clause or an arbitration agreement.

[55] No specific words or forms are required to be used or filled in order to constitute an arbitration clause or an arbitration agreement. Even an electronic transmission referring to or implying the parties' intention to submit to arbitration would be sufficient to attract arbitration. What is of importance is this. That there must be an agreement to refer disputes to arbitration. That is essential. And the intention to arbitrate must be clear and unequivocal. Thus, when there is a clear intention to arbitrate, effect must be given to it notwithstanding that the arbitration clause is incomplete or it lacks certain particulars (*Lim Su Sang v Teck Guan Construction & Development Co Ltd* [1966] 2 MLJ 29 (FC); and *Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82).

[56] Why must disputing parties resort to arbitration? The answer lies in the desire of the parties to refer to a hand-picked expert tribunal to resolve their dispute on a perceived notion that it can be conducted more proficiently, economically and expeditiously than in court. The parties perceive that arbitration would be faster and less expensive than litigation in court. The parties also perceive that neutrality of the forum can be achieved through arbitration. Whatever their motives, we are not concerned. The June contract must be referred to arbitration. There are no two ways about it.

[57] I now make those orders like what my learned brother Low Hop Bing JCA has done. I do so accordingly.

T Selventhiranathan JCA:

[58] I have had the opportunity of reading the judgments in draft of both my learned brothers Low Hop Bing and Abdul Malik bin Ishak JJCA and agree in the main with the reasons therein as to the decision arrived at by us. Having read those judgments, I wish to add to the reasons given by way of this supporting judgment. However, since there is a plethora of authorities cited in the judgments of my learned brothers, it suffices for me to discuss the interpretation of enacted law in this judgment.

[59] The facts of the case have been well stated by my learned brother Low Hop Bing JCA in his judgment and I adopt them here to avoid repetition. Usage in this judgment of particular terminology shall bear the meaning it has in that judgment unless the contrary intention appears.

[60] The pivotal issue in relation to the June contract is whether the parties had intended that differences or disputes thereunder between them should be referred to arbitration.

[61] I agree with my learned brothers that by incorporating the provisions of the standard PAM contract into the June contract, the parties intended that any differences or disputes between them arising under the latter contract should be referred to arbitration.

[62] The defendant in filing its defence in respect of the plaintiff's claim under the August contract cannot be said to have submitted to the jurisdiction of the court in respect of the claim under the June contract. The August contract did not in any way incorporate the provisions of the PAM contract into its body. As such, the defendant correctly filed its defence in respect of the plaintiffs claim under the August contract.

[63] In light of the foregoing, the learned judicial commissioner was in error when he failed to give effect to s 10 of the Arbitration Act 2005 ('s 10' and 'the Act') which was enacted 'to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters', as stated in the long title to the Act.

[64] The Arbitration Act 1952 ('the repealed Act') was repealed by the Act and cases decided before the repeal cannot generally be accepted as laying down good case law under the Act except where they are consistent with its provisions.

[65] In my view, with respect, the defendant need not even have sought to invoke the inherent jurisdiction of the court under O 92 r 4 of the Rules of the High Court 1980 in the alternative to grant the application for the stay of proceedings as there is ample provision therefor under s 10. When there is a provision in a law which is clearly intended to encapsulate a given situation, there is no need to seek recourse to the inherent jurisdiction of the court. However, the defendant in the instant case may have sought to invoke the inherent jurisdiction of the court *ex abundanti cautela* or, in other words, from an abundance or excess of caution.

[66] Section 10 is in much wider terms than s 6 of the repealed Act which it supplanted. The Act was legislated to reform the law relating to arbitration with the intention that a party which had consensually agreed with another party to submit differences or disputes between them to arbitration should not subsequently be allowed to resile from that consensual agreement with the aim of thwarting the other party's intention of having the differences or

disputes between them arbitrated, to the detriment of that other party. Furthermore, the interpretation of an arbitration agreement under s 2 of the repealed Act was in much narrower terms than the definition of an arbitration agreement under s 9 of the Act. Section 9(5) of the Act provides for the incorporation of an arbitration clause in a document into an agreement to constitute the latter as an arbitration agreement to which the Act shall apply. This is known as incorporation by reference. Section 9(5) of the Act reads as follows:

> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

It is clear from a reading of the above provision that the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement.

[67] The Act was under gestation, I believe, for some period of time before it saw the light of day when it received the Royal Assent on 30 December 2005, was published in the *Gazette* on 31 December 2005 and was finally born when it came into operation, pursuant to s 1(2) of the Act, on 15 March 2006 vide PU(B) 65/2006.

[68] Submission of differences or disputes to arbitration had taken off in a big way in many countries towards the latter part of the last century and is continuing into the present as an expeditious and less onerous or less cumbersome way of parties resolving differences or disputes between them without recourse to curial determination of the same. Technicalities which feature ominously in court can be minimised or done away with altogether in an arbitration.

[69] The passing of the Act evinced Malaysia's intention and determination to join the ranks of those countries where parties are wont to submit differences or disputes to arbitration and the courts have to give effect to that postulation of the Legislature by interpreting the Act in accordance with the intention of the Legislature.

[70] Having said that, it cannot be denied that the defendant held fast to the original intention of the parties to have any differences or disputes between them in respect of the June contract referred to arbitration through the incorporation through reference in that contract of the PAM contract. The defendant exercised due caution to preserve its rights by not filing its defence to the claim under the June contract. There was no other reason for the defendant not to do so.

[71] To my mind, the claim under the June contract is 'in respect of a matter which is the subject of an arbitration agreement' to fall squarely within the first precondition to refer the matter to arbitration under s 10(1). The defendant in the present case did not take any step in the proceedings in relation to that matter, ie the June contract, but instead filed its application for a stay, thereby fulfilling the second precondition for s 10(1) to apply.

[72] In the foregoing circumstances the court was duty-bound to stay the proceedings in relation to the matter and refer the parties to arbitration. The only way the court could refrain from making the order for stay would be if it found, under s 10(1)(a) or s 10(1)(b), the following exceptions to be applicable:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

However, the two exceptions as set out above did not arise for determination.

[73] Hence, the proceedings in relation to the plaintiffs claim predicated on the June contract should have been stayed and the matter, ie the differences or disputes between the parties under the June contract, should have been referred to arbitration pursuant to s 10(1). I accordingly made the orders as set out in the judgment of my learned brother Low Hop Bing JCA.

Defendant's appeal allowed with costs.

Reported by Kohila Nesan